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No.

In the Supreme Court of the United States

OCTOBER TERM, 1995

IMMIGRATION AND NATURALIZATION SERVICE,
PETITIONER

v.

YUEH-SHAIO YANG

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the court of appeals improperly refused to allow the Attorney General to consider, in exercising her statutory discretion not to waive respondent's deportation, various acts of fraud that respondent committed before and after his initial fraudulent entry into the United States.

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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the Immigration and Naturalization Service, respectfully petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-4a) is reported at 58 F.3d 452. The opinion of the Board of Immigration Appeals (App., *infra*, 5a-11a) and the oral decision of the immigration judge (App., *infra*, 12a-25a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 22, 1995. A petition for rehearing was denied on October 5, 1995. App., *infra*, 26a. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

1. Section 241(a)(1) of the Immigration and Nationality Act (INA), 8 U.S.C. 1251(a)(1), provides in pertinent part as follows:

(a) Classes of deportable aliens

Any alien (including an alien crewman) in the United States shall, upon the order of the Attorney General, be deported if the alien is within one or more of the following classes of deportable aliens:

(1) Excludable at time of entry or of adjustment of status or violates status

(A) Excludable aliens

Any alien who at the time of entry or adjustment of status was within one or more of the classes of aliens excludable by the law existing at such time is deportable.

* * * * *

(H) Waiver authorized for certain misrepresentations

The provisions of this paragraph relating to the deportation of aliens within the United States on the ground that they were excludable at the time of entry as aliens, described in section 1182(a)(6)(C)(i) of this title, whether willful or

innocent, may, in the discretion of the Attorney General, be waived for any alien (other than an alien described in paragraph (4)(D) [relating to certain aliens who assisted in Nazi persecution or engaged in genocide]) who—

(i) is the spouse, parent, son, or daughter of a citizen of the United States or of an alien lawfully admitted to the United States for permanent residence; and

(ii) was in possession of an immigrant visa or equivalent document and was otherwise admissible to the United States at the time of such entry except for those grounds of inadmissibility specified under paragraphs (5)(A) and (7)(A) of section 1182(a) of this title [relating to possession of valid labor certifications and valid immigrant visas, respectively] which were a direct result of that fraud or misrepresentation.

A waiver of deportation for fraud or misrepresentation granted under this subparagraph shall also operate to waive deportation based on the grounds of inadmissibility at entry directly resulting from such fraud or misrepresentation.

2. Section 212 of the INA, 8 U.S.C. 1182, provides in pertinent part as follows:

(a) Classes of excludable aliens

Except as otherwise provided in this chapter, the following describes classes of excludable aliens who are ineligible to receive visas and who shall be excluded from admission into the United States:

* * * * *

(6) Illegal entrants and immigration violators

* * * * *

(C) Misrepresentation

(i) In general

Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or entry into the United States or other benefit provided under this chapter is excludable.

(ii) Waiver authorized

For provision authorizing waiver of clause (i), see subsection (i) of this section.

* * * * * *

(i) Admission of immigrant excludable for fraud or willful misrepresentation of material fact

The Attorney General may, in his discretion, waive application of clause (i) of subsection (a)(6)(C) of this section—

(1) in the case of an immigrant who is the spouse, parent, or son or daughter of a United States citizen or of an immigrant lawfully admitted for permanent residence, or

(2) if the fraud or misrepresentation occurred at least 10 years before the date of the immigrant's application for a visa, entry, or adjustment of status and it is established to the satisfaction of the Attorney General that the admission to the United States of such immigrant would not be

contrary to the national welfare, safety, or security of the United States.

3. Relevant prior versions of Sections 241(f) and 212(a) of the INA, 8 U.S.C. 1251(f) and 1182(a), are set out in Appendix E hereto, beginning at page 28a.

STATEMENT

1. Respondent and his wife are natives of the People's Republic of China and citizens of Taiwan. App., *infra*, 13a. They were married in China in 1940 (*id.* at 16a), emigrated to Taiwan in 1945 (see *id.* at 8a-9a), and had six children together (*id.* at 8a).

In 1977, while in the United States as a visitor, respondent's wife was introduced by a friend to an individual who told her that if she were single and willing to pay or "invest" $60,000, she could obtain United States citizenship or permanent residency. App., *infra*, 6a, 15a. The couple accordingly obtained a divorce in Taiwan, and in 1978 respondent's wife returned to the United States and paid $60,000 (apparently obtained from respondent or from joint funds) to purchase a fraudulent United States birth certificate and passport in the name of Mary Wong. *Id.* at 6a-7a, 16a, 18a. Respondent then married "Mary Wong" in Taiwan, and subsequently sought and obtained entry to the United States as a lawful permanent resident on the ground that he was married to a United States citizen. *Id.* at 7a, 16a-17a.

Respondent and his wife thereafter successfully petitioned for immigrant status for four of their six adult children. App., *infra*, 16a-17a. One son purported to marry one of the daughters and attempted to bring her into the United States as his wife; both were later prosecuted for that and other immigration fraud. See *id.* at 17a. Another daughter obtained

United States citizenship through her own marriage to a citizen. *Ibid.* The family resided together in California in a house purchased by respondent. *Id.* at 19a.

In 1982, respondent applied for naturalization as a United States citizen. App., *infra*, 7a. In his application, respondent claimed that his wife, "Mary Wong," was a United States citizen by birth. In May 1984, respondent's wife began to worry about immigration fraud. She therefore abandoned her identity as "Mary Wong," and had her daughter file a petition to allow her to immigrate again, this time under her true name, as the parent of a United States citizen. In 1985, respondent and "Mary Wong" obtained a divorce in California. Later, after the Immigration and Naturalization Service (INS) commenced deportation proceedings against both respondent and his wife, they again remarried, this time using her true name. *Id.* at 7a-8a, 17a-18a.

2. In January 1992, the INS initiated deportation proceedings against respondent, partly on the ground that he had procured his initial entry into the United States by fraud or willful misrepresentation. App., *infra*, 13a; see 8 U.S.C. 1182(a)(6)(C)(i) (formerly 8 U.S.C. 1182(a)(19) (1988)), 1251(a)(1)(A). Respondent conceded that he was deportable, but he sought a waiver of deportation under Section 241(a)(1)(H) of the Immigration and Nationality Act (INA), 8 U.S.C. 1251(a)(1)(H). App., *infra*, 13a. Section 241(a)(1)(H) provides that the provisions of the INA relating to the deportation of aliens who sought to or did procure entry through fraud or willful misrepresentation of a material fact "may, in the discretion of the Attorney General, be waived" for an alien who (i) is the spouse, parent, or child of a United States citizen or lawful

permanent resident, and (ii) possessed an immigrant visa or equivalent documentation and was "otherwise admissible" to the United States at the time of entry.

At the deportation hearing, respondent "claimed that [he] had believed in the propriety of [his] method of entering the United States," and that he did not find it "unusual that [his] wife would adopt a different name, present another's birth certificate in order to obtain immigration benefits, or be required to obtain a sham divorce." App., *infra*, 8a. Respondent also claimed that he was indigent, and that he was not aware of his family's other acts of immigration fraud, including the "marriage" between two of his children (both of whom resided with him), until after they had been discovered by the INS. *Ibid.*

In October 1992, the immigration judge denied respondent's request for a waiver. App., *infra*, 12a-25a. Relying on judicial precedent that had, in turn, relied on the Attorney General's position concerning what factors should be considered in determining whether to waive deportation based on an initial fraud committed on entry into the United States, the judge noted that he "[did] not take into account the original fraud perpetrated against the United States Government by [respondent]; that is, * * * respondent's coming to this country and making claims falsely to be a spouse of a United States citizen." *Id.* at 14a (citing *Liwanag* v. *INS*, 872 F.2d 685, 687 (5th Cir. 1989)); see also App., *infra*, 21a. The immigration judge pointed out, however, that a waiver under Section 241(a)(1)(H) could "appropriately be denied if an alien *continues* in his fraud or in other subsequent acts from the original fraud or misrepresentations." App., *infra*, 14a-15a (emphasis added). The immigration judge accordingly based his decision in part

on respondent's acts of fraud after his initial entry. *Id.* at 20a, 23a, 24a-25a. In addition, the immigration judge relied on his conclusion that respondent's testimony was "not * * * candid," particularly in so far as he originally claimed indigency and a need for familial support, while after persistent questioning he admitted that he had "over $3 million in property and real estate[,] and liquid assets in cash, stocks, etc. of $700,000." *Id.* at 23a-24a.

The Board of Immigration Appeals (BIA) affirmed the immigration judge's decision. App., *infra*, 5a-11a. The BIA observed that, "[a]s with other discretionary applications for a waiver of deportability," Section 241(a)(1)(H) "necessitates a balancing of the alien's undesirability as a permanent resident [against] the social and humane considerations present to determine whether according him such relief is in the best interest of this country." App., *infra*, 10a (citing *In re Marin*, 16 I. & N. Dec. 581 (BIA 1978) (discussing waiver of deportation under INA § 212(c), 8 U.S.C. 1182(c)). In this case, the BIA based its denial of relief on respondent's "acts of immigration fraud before and after his 1978 entry into the United States" (including participation in his wife's illegal immigration, two sham divorces, and intervening remarriage under a false name), and on his "apparent lack of candor during the deportation hearing regarding his knowledge of the significance of his fraud." App., *infra*, 10a. Although the BIA recognized (*id.* at 11a) that respondent had family and business ties to the United States that might have supported a waiver, it concluded (*id.* at 10a-11a) that those equities were outweighed by respondent's "pattern of violating this country's immigration laws through fraud." *Id.* at 10a-11a.

3. The court of appeals granted respondent's petition for review, vacated the BIA's decision, and remanded the case for further proceedings. App., *infra*, 1a-4a. In so doing, the court applied its own version of the rule applied by the immigration judge (App., *infra*, 14a-15a) and the BIA (*id.* at 10a), that the initial fraud at entry should be disregarded in balancing the equities with respect to a waiver under Section 241(a)(1)(H). The court held that, in balancing those equities in this case, the Board should not have considered respondent's participation in his wife's illegal entry into this country, including his sham divorces and marriages, because those acts were "inextricably intertwined with [respondent's] own efforts to secure entry into the country and must be considered part of [his] initial fraud." App., *infra*, 2a. Furthermore, the court held that the Board should not have considered respondent's fraudulent application for naturalization, which it held "must [also] be considered an extension of the initial fraud." *Id.* at 2a-3a. The Court remanded the case, however, because it concluded that "being untruthful with the immigration court is an adverse factor which may be properly considered by the BIA." *Id.* at 3a.

The court denied the government's petition for rehearing, and rejected a suggestion of rehearing en banc. App., *infra*, 26a.

REASONS FOR GRANTING THE PETITION

The court of appeals has held that the Attorney General abused her discretion by refusing to waive the deportation of an alien who not only entered this country through fraud and misrepresentation, but also engaged in a pattern of serious immigration fraud both before and after that entry—culminating

in a fraudulent application for naturalization as a citizen of the United States. The Ninth Circuit's decision ignores the text and history of the relevant provision of the Immigration and Nationality Act (INA), and it conflicts with the decisions of other courts of appeals. If uncorrected, the decision below will impede the proper and uniform administration of the immigration laws, thereby creating unfairness and imposing a serious practical burden on immigration authorities. It will also require the retention in this country of individuals whom Congress has declared to be deportable, and who the Attorney General believes are unworthy of a favorable exercise of her statutory discretion to waive deportation. The court of appeals' error thus warrants review and correction by this Court.

1. An alien who procured his initial entry into the United States "by fraud or [by] willfully misrepresenting a material fact," 8 U.S.C. 1182(a)(6)(C)(i), is normally subject to deportation once the deception is discovered. 8 U.S.C. 1251(a)(1)(A). If the alien is the spouse, parent, or child of a citizen or lawful resident alien, however, and if, at the time of entry, he would have been eligible for admission to the United States but for the fraud or misrepresentation, then deportation may be waived, "in the discretion of the Attorney General." 8 U.S.C. 1251(a)(1)(H). A decision not to grant such a waiver, like other discretionary determinations made during administrative deportation proceedings, may be reviewed by a court of appeals under 8 U.S.C. 1105a only for abuse of discretion. *Foti* v. *INS*, 375 U.S. 217, 226-232 (1963).

The waiver provision at issue here was originally enacted in 1957, and was reenacted as Section 241(f) of the INA in 1961. Act of Sept. 11, 1957, Pub L. No. 85-

316, § 7, 71 Stat. 640; Act of Sept. 26, 1961, Pub L. No. 87-301, § 16, 75 Stat. 655; see *INS* v. *Errico*, 385 U.S. 214, 220-223 (1966). In each instance, Congress made the waiver mandatory when the ground for deportation was that an alien had previously entered the United States through fraud or misrepresentation. See 8 U.S.C. 1251(f) (1964); see also *Errico*, 385 U.S. at 224-225; *Reid* v. *INS*, 420 U.S. 619, 622-631 (1975).[1]

Over the ensuing 20 years, the mandatory waiver provison became "a major source of controversy and litigation." H.R. Rep. No. 264, 97th Cong., 1st Sess. 25 (1981). Although Congress had "original[ly] inten[ded] * * * simply to waive relatively minor grounds for deportation" for aliens with close citizen or permanent resident relatives, the scope of the waiver became "increasingly unclear" as litigants sought to expand the provision into "a charter of amnesty, waiving all restrictions for those who had entered the United States through fraud." *Ibid.* By 1975, this Court was moved to observe that decisions of the lower courts under Section 241(f) might be "summarized in the language of Macduff: 'Confusion now hath made his masterpiece.'" *Reid*, 420 U.S. at 628. Four years later, the Acting Commissioner of the INS echoed that assessment when he pointed out in congressional testimony that questions concerning the waiver provision had reached this Court twice (in *Errico* and *Reid*) with "no clear resolution, and

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[1] Both Acts also provided for discretionary waiver of exclusion on the basis of fraud or misrepresentation in the case of certain aliens still outside the United States who had a citizen or lawful resident spouse, parent, or child. See 8 U.S.C. 1251a (1958); 8 U.S.C. 1182(i) (1964); H.R. Rep. No. 1199, 85th Cong., 1st Sess. 10-11 (1957); S. Rep. No. 1057, 85th Cong., 1st Sess. 5 (1957).

differing administrative and judicial interpretations ha[d] left the law in a state of confusion which ma[de] it virtually impossible for the INS to uniformly administer" the provision. *Efficiency of the Immigration and Naturalization Service: Hearing on H.R. 5087 Before the Subcomm. on Immigration, Refugees, and International Law of the House Comm. on the Judiciary*, 96th Cong., 1st Sess. 4 (1979) (hereafter *Efficiency of the INS*).

In light of that experience, legislation was proposed in Congress in 1979 to repeal Section 241(f) entirely. See *Efficiency of the INS* 7-8. The INS, however, recommended instead that the waiver provision be clarified and made "discretionary with the Attorney General," which would "allow[] the INS to consider relief in cases where the misrepresentation [which would otherwise require deportation] may be outweighed by family ties." *Id.* at 4; see *id.* at 7-8. Congress ultimately accepted that suggestion, and the relevant committee report reflects the expectation that clarifying Section 241(f) and "making the waiver discretionary * * * should obviate the need for further litigation, and promote the uniform administration" of the waiver provision. H.R. Rep. No. 264, *supra*, at 25.

The discretionary nature of the amended waiver provision is embodied in what is now Section 241(a)(1)(H) of the INA, 8 U.S.C. 1251(a)(1)(H), which provides that deportation "may, in the discretion of the Attorney General, be waived for any alien" who meets other specified requirements.[2] The Act itself

[2] Section 241(f) was repealed and replaced, so far as is relevant here, by Section 241(a)(1)(H) in 1990. Immigration Act of 1990, Pub. L. No. 101-649, Tit. VI, §§ 602(a) and (b)(1), 104 Stat. 5077, 5081.

provides no standards for, or limitations upon, the Attorney General's discretion in determining whether or not to waive deportation in a particular case. Under its language, she would be fully justified in considering (along with other positive and negative factors) the nature and gravity of the initial fraud or misrepresentation on entry that renders the alien deportable. See *Rodriguez-Barajas* v. *INS*, 992 F.2d 94, 97 (7th Cir. 1993); cf. *Jay* v. *Boyd*, 351 U.S. 345, 354 (1956) (discussing exercise of discretion in granting suspension of deportation under 8 U.S.C. 1254).

The Attorney General, acting through the Board of Immigration Appeals (BIA), has to date adopted a more lenient policy. The BIA has concluded that, in weighing the factors for and against a waiver, the fraud or misrepresentation that renders the alien excludable "is the action for which [he] seek[s] to be forgiven" through the waiver, and therefore "should not [itself] be [weighed] as an adverse factor." *In re Alonzo*, 17 I. & N. Dec. 292, 294 (1979); see also *In re Da Silva*, 17 I. & N. Dec. 288, 290 (1979) ("While the initial fraud is obviously adverse, this is the action for which [the alien] seeks to be forgiven.")[3] The

[3] *Alonzo* and *Da Silva* were both exclusion cases, so that the waiver provision at issue was that set out in INA § 212(i), 8 U.S.C. 1182(i). See note 1, *supra*. Since 1981, when Congress made the parallel waiver-of-deportation provision in Section 241(f) (now Section 241(a)(1)(H)) discretionary, the BIA and the courts have generally held or assumed that the standards for discretionary relief under the two provisions should be the same. See, *e.g.*, *Delmundo* v. *INS*, 43 F.3d 436, 440 & n.4 (9th Cir. 1994). We make the same assumption for purposes of this petition.

Attorney General has not, however, chosen to extend that leniency to any fraud or misrepresentation occurring before or after the alien's initial entry. The BIA accordingly weighs such separate acts of dishonesty in the balance in determining whether or not a particular alien merits a discretionary waiver of deportation. See, *e.g.*, *Delmundo* v. *INS*, 43 F.3d 436 (9th Cir. 1994) (reversing BIA decision that relied on post-entry fraud).

The BIA followed that approach in this case, taking into account acts that both preceded and followed respondent's fraudulent entry. The Board found that respondent "engaged in a pattern of violating this country's immigration laws through fraud" by, among other things, (i) participating in his wife's fraudulent entry through a sham divorce and remarriage, (ii) entering the country fraudulently himself, (iii) applying for naturalization under false pretenses, and (iv) entering into another sham divorce in order to "rectify" his wife's initial fraud. App., *infra*, 10a. In accordance with the rule of *Alonzo* and *Da Silva*, the Board put to one side the fraud involved in respondent's own initial entry into the United States. *Ibid.* The Board weighed respondent's various other acts of fraud against him, however, in concluding that he did not merit a discretionary waiver of deportation. App., *infra*, 10a-11a. Neither the Board's procedure nor its conclusion remotely suggests any abuse of the broad discretion conferred on the Attorney General by Section 241(a)(1)(H).

2. The court of appeals nonetheless summarily reversed the Board's decision in this case. App., *infra*, 1a-4a. The court concluded that respondent's assistance in his wife's various frauds was "inextricably intertwined with [his] own efforts to secure entry

into the country," and that his own fraudulent application for citizenship was merely "an extension of [his] initial fraud." *Id.* at 2a-3a. Thus, although the court purported to apply the Board's own "initial fraud" rule, it substituted its own view for the Board's in determining how that rule should be interpreted and applied. In so doing, it relied in part on its prior decision in *Delmundo* v. *INS*, 43 F.3d 436 (9th Cir. 1994). Indeed, this case is one of a series of five recent decisions in which the court below has reversed BIA decisions denying discretionary relief from deportation under Section 241(a)(1)(H) or its predecessor, Section 241(f) (or under the parallel provision in Section 212(i) that is applicable to exclusion proceedings; see note 3, *supra*).

That series began with *Braun* v. *INS*, 992 F.2d 1016 (9th Cir. 1993). In *Braun*, the court of appeals noted the Board's practice of not considering the alien's initial-entry fraud as an adverse factor (*id.* at 1020-1021), and incorrectly suggested that that practice was required by the INA itself (*id.* at 1019-1020). The court then imposed its own view of how the initial fraud rule should be applied to the facts of that case. *Id.* at 1020-1021. Over the past two years, the court of appeals has followed *Braun* in *Casem* v. *INS*, 8 F.3d 700, 703 n.1 (majority opinion), 704 (Rymer, J., concurring) (1993); in *Delmundo*, *supra*; in this case; and in *Alquisalas* v. *INS*, 61 F.3d 722 (1995). In *Delmundo*, for example, the court held that any post-entry fraud undertaken to preserve the immigrant status obtained through an alien's initial fraud is immune from consideration, so that "misrepresentations made to obtain items necessary to live and work"—in that case, a driver's license, social security card, and voter identification card—"may not

be held against" the waiver applicant. *Delmundo*, 43 F.3d at 441. In this case, the court extended the same construction of the "initial fraud" rule to respondent's continuing course of serious immigration fraud—culminating in his fraudulent application for naturalization as a United States citizen, which the court held likewise "must be considered an extension of the initial fraud." App., *infra*, 2a-3a.[4]

As another panel of the Ninth Circuit has observed, the erroneous course of decisions that began with *Braun* has thus led the court of appeals to "substitute [its] discretion for that of the Attorney General" in evaluating requests for waivers under Section 241(a)(1)(H). *Alquisalas* v. *INS*, 61 F.3d at 724.[5]

[4] Both in this case and in *Delmundo*, the court of appeals remanded to the BIA for a reweighing of the equities, taking into account only the fact that in each case the alien apparently lied to the immigration judge in the course of the deportation proceedings under review. App., *infra*, 3a-4a; *Delmundo*, 43 F.3d at 442. The court did not explain why lying to an immigration judge may be counted against an alien in balancing the equities under the court's version of the "initial fraud" rule, whereas lying to the INS or to other governmental authorities (such as motor vehicle or Social Security officials) about the same matters may not be. Moreover, in this case, respondent could have obtained his 1985 divorce only by committing fraud on the court that entered the decree (*i.e.*, by misrepresenting his wife's identity and their marital history); yet the Ninth Circuit's decision would force the Attorney General to countenance that fraud, while allowing her to take account of respondent's "apparent lack of candor" (App., *infra*, 3a) before the immigration judge. There is no apparent reason for that distinction.

[5] *Alquisalas* involved an alien who originally entered the United States by fraudulently concealing the fact that he was married and the father of two children, subsequently went through a second marriage ceremony with his wife abroad, and ultimately divorced that wife and remarried a United States citizen. See 61 F.3d at 723, 724. The panel that decided *Alquisalas* made clear that, in its view, the Ninth Circuit's recent cases had inappropriately narrowed the scope of the Attorney General's discretion. *Id.* at 724-725. Nonetheless, the panel reversed the BIA's decision "[u]nder the compulsion of *Braun*," *Delmundo*, and the decision in this case. *Id.* at 725.

In its petition for rehearing and suggestion of rehearing en banc in this case, the INS relied (at 4-5) on those observations by the *Alquisalas* panel as a reason why the Ninth Circuit should grant en banc review and conform its precedent to the proper scope of judicial review of the Attorney General's discretionary waiver decisions. The full court nevertheless rejected our suggestion of rehearing en banc. Review by this Court is therefore the only remaining means for correcting the Ninth Circuit's expanding list of erroneous rulings in this area.

Indeed, the *Delmundo* court justified its result on the basis of a frank disagreement with the Board about how best to administer the Nation's immigration laws: "To follow the BIA's distinction between initial and subsequent instances of fraud would severely impair the effectiveness of relief statutes such as [INA] §§ 212(i) and 241(f)." 43 F.3d at 441. The INA commits decisions of that sort to the Attorney General, not to the courts. Compare, *e.g.*, *INS* v. *Rios-Pineda*, 471 U.S. 444, 451-452 (1985) ("[I]t is not for the judiciary to usurp Congress' grant of authority to the Attorney General by applying what approximates *de novo* appellate review.").

3. The court of appeals' approach to reviewing the Attorney General's exercise of her discretion under Section 241(a)(1)(H) conflicts with that of other courts of appeals. In *Rodriguez-Barajas* v. *INS*, *supra*, the Seventh Circuit forcefully restated the fundamental rule of deference to any reasonable decision by the Attorney General:

> Discretion is not compulsion. The Attorney General has a choice to make, and courts review discretionary choices under the immigration laws with great deference. * * * [T]he Attorney General exercises a delegated power. What sort of standard to use (strict versus lenient) and how to apply it to individual aliens are in her hands. The judicial role lies in policing the boundaries of the statutory delegation and in assuring that discretion within the scope of that delegation is exercised in a reasoned way.

992 F.2d at 96. Indeed, the *Rodriguez-Barajas* court held squarely that the Attorney General is under no statutory compulsion to disregard the nature and severity of even an alien's initial fraud in considering whether or not to grant a waiver of deportation under Section 241(f) (now Section 241(a)(1)(H)). 992 F.2d at 97. *Rodriguez-Barajas* thus properly recognized that any restrictions the Attorney General may observe concerning what misconduct by the alien will be considered in making waiver determinations under Section 241(a)(1)(H) arise from her exercise of her own discretion, and not from any requirement of the Act. There is therefore little doubt that the BIA's entirely reasonable decision in this case would have been sustained had it been challenged in the Seventh Circuit, rather than in the court below.

Similarly, in *Liwanag* v. *INS*, 872 F.2d 685 (1989), reh'g denied, 878 F.2d 1435 (1989), the Fifth Circuit properly deferred to the BIA's conclusion that an alien's fraudulent acts in undertaking a second marriage to his wife, filing an immigrant visa petition on her behalf, and lying to an INS officer about their marriage were separate from his initial fraud, which

had involved a claim that he was not married made in order to secure his own initial entry into the United States. 872 F.2d at 687-688. The Fifth Circuit's decision in *Liwanag* conflicts directly on its facts with the Ninth Circuit's decision in this case that respondent's "participation in his wife's fraudulent entry into the country, including his taking part in sham divorces and remarriages[,] * * * [was] inextricably intertwined with [his] own efforts to secure entry into the country and must be considered part of the initial fraud." App., *infra*, 2a. More importantly, however, like *Rodriguez-Barajas*, the Fifth Circuit's holding in *Liwanag* conflicts in its central principle with the effective holdings by the Ninth Circuit in *Braun*, *Delmundo*, and the decision below that the court of appeals should review such questions de novo, rather than solely for abuse of the Attorney General's discretion. Cf. *Akindemowo* v. *INS*, 61 F.3d 282 (4th Cir. 1995) (emphasizing deference to the Attorney General's reasonable resolution of an analogous question concerning when separate crimes are part of a "single scheme of criminal misconduct" for purposes of INA § 241(a)(2)(A)(ii), 8 U.S.C. 1251(a)(2)(A)(ii)).

4. If allowed to stand, the Ninth Circuit's approach to review of discretionary waiver decisions under Section 241(a)(1)(H), and the conflict that that approach has created with the BIA and with other courts of appeals, will present a serious obstacle to the appropriate and even-handed implementation of the Attorney General's statutory waiver authority. The resulting disparity in applicable rules is unfair both to the INS, which must administer Section 241(a)(1)(H) throughout the country (see, *e.g.*, *Rios-Pineda*, 471 U.S. at 451), and to potentially eligi-

ble aliens, who are entitled to expect uniformity in the application of the waiver provision, regardless of the region in which their cases arise. Indeed, the lack of uniformity caused by the Ninth Circuit's decisions will prevent the Attorney General and her delegates from achieving precisely those goals that Congress identified when, at the INS's request, it provided for discretionary implementation of the waiver authority, rather than repealing it entirely: to "obviate the need for further litigation, and [to] promote the uniform administration of" the provision. H.R. Rep. No. 264, *supra*, at 25.

Even within the Ninth Circuit itself, application of the *Braun-Delmundo* rule will continue to produce anomalous results. For example, the rule places an alien who obtains his initial entry by fraud, and then commits a series of further fraudulent acts to preserve his illicit position, in a better position than an alien who enters the country properly, but later embarks on a similar series of fraudulent acts in an attempt to remain here. The former will, in the Ninth Circuit, have all of his frauds ignored in evaluating his request for a waiver of deportation under Section 241(a)(1)(H); the latter will have them all weighed in the balance against him if he seeks some other form of discretionary relief, such as that available under Section 212(c) of the Act, 8 U.S.C. 1182(c). That cannot be the result that Congress intended in providing for a limited, discretionary waiver of fraud in the initial entry itself.

The gravest anomaly caused by the Ninth Circuit's rule is illustrated by the facts of this case. As we have noted, the decision below requires the Attorney General to ignore, in balancing the equities relevant to respondent's request for a waiver of deportation,

the fact that he submitted a fraudulent petition for naturalization as a citizen of the United States. App., *infra*, 2a-3a. The court based that result on its conclusion that "applying for citizenship is similar in kind to the acts at issue in *Delmundo*" (*i.e.*, applying for a social security card, driver's license, and voter identification card), and that the fraudulent application therefore "must be considered an extension of [respondent's] initial fraud." *Id.* at 2a-3a. Yet, fraud in a naturalization application is normally a sufficient basis for *revocation of citizenship*, even if it is not discovered for many years. See 8 U.S.C. 1451; *Kungys* v. *United States*, 485 U.S. 759 (1988); *Fedorenko* v. *INS*, 449 U.S. 490 (1981). Congress did not intend for the Attorney General to ignore such fraud completely in deciding whether to waive the expulsion of an otherwise deportable alien.

It is, moreover, quite wrong to equate respondent's petition for naturalization as a citizen with the sort of acts at issue in *Delmundo*. Citizenship is a status distinct from and superior to permanent residence. Indeed, "[i]t would be difficult to exaggerate its value and importance." *Schneiderman* v. *United States*, 320 U.S. 118, 122 (1942). Fraud in obtaining the greater benefit cannot properly be dismissed as a mere "extension" of earlier fraud in obtaining the lesser.[6]

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[6] Perhaps the most serious potential ramification of the decision below is the possibility that, if the Attorney General is precluded from considering respondent's pattern of post-entry fraud, including his fraudulent naturalization petition, for purposes of Section 241(a)(1)(H), she may also be precluded from considering it for purposes of acting on the naturalization petition itself. Under Section 310 of the INA, 8 U.S.C. 1421, the Attorney General has exclusive jurisdiction to grant peti-

The court of appeals' decision in this case thus requires the retention in this country of an individual whose entire relationship with the United States immigration system has been characterized by fraud, corruption, and deceit. In so doing, it improperly interferes with the Attorney General's exercise of her statutory discretion, and it conflicts in both approach and result with the decisions of two other courts of appeals. Taken together with other recent decisions from the same court of appeals, the court's decision moves a long way toward turning Section 241(a)(1)(H) into exactly what Congress sought to avoid in 1981, when it confided the decisions concerning waivers of this sort to the Attorney General's discretion: an engine of uncertainty and litigation, and in substance "a charter of amnesty, waiving all

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tions for naturalization. The BIA has previously decided, in another context, that a waiver of deportation under Section 241(a)(1)(H) also "waives the underlying fraud," effectively erasing the initial illegality and causing the recipient of the waiver to be treated as a lawful permanent resident from the time of entry. *In re Sosa-Hernandez*, BIA Interim Dec. No. 3214 (Nov. 12, 1993); see *In re Manchisi*, 12 I. & N. Dec. 132 (1967). We believe that the Attorney General should be able to conclude, in a case like respondent's, that an alien to whom she has been forced to grant a waiver of deportation under the Ninth Circuit's version of the "initial fraud" rule nonetheless has not displayed the "good moral character" required for naturalization as a citizen. 8 U.S.C. 1427(a); see also 8 U.S.C. 1427(d) and (e). It is, however, quite possible that a court—particularly the Ninth Circuit—would hold that such a waiver precludes consideration of the waived fraudulent acts for purposes of making any other determination under the INA. That concern is particularly serious because of recent increases in the number of naturalization petitions received by the Attorney General, which the INS informs us rose from 341,850 in fiscal year 1990 to 1,210,969 in fiscal year 1995.

restrictions for those who * * * entered the United States by fraud." H.R. Rep. No. 264, *supra*, at 25.

More broadly, the decision below typifies the course of recent Ninth Circuit decisions in which that court has substituted its judgment for that of the Attorney General on matters committed by Congress to her discretion. In the petition for a writ of certiorari in *INS* v. *Elramly* that we are filing simultaneously with the petition in this case, we seek review of another such decision by the same court. In that case, the Ninth Circuit held that the Attorney General, acting through the BIA, may not make a categorical judgment that aliens convicted of drug-trafficking offenses must show unusual or outstanding equities in order to merit a favorable exercise of discretion under Section 212(c) of the Act. *Elramly* v. *INS*, 49 F.3d 535 (1995). See also *Elramly* Pet. 14-15 (citing other recent Ninth Circuit decisions).

For all of the foregoing reasons, review by this Court is necessary in this case, both to restore to the Attorney General the discretion that Congress intended her to have in determining whether to grant relief from deportation under Section 241(a)(1)(H), and to restore in the Ninth Circuit the relationship between the Attorney General and reviewing courts that Congress intended to prevail in the administration of the Nation's immigration laws.

CONCLUSION

The petition for a writ certiorari should be granted.

Respectfully submitted.

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DECEMBER 1995

APPENDIX A

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 93-70899
INS No. A36-413-841

YUEH-SHAIO YANG, PETITIONER,

v.

IMMIGRATION AND NATURALIZATION SERVICE, RESPONDENT

Petition to Review a Decision of the Immigration and Naturalization Service

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Argued and submitted April 3, 1995—
Pasadena, California

FILED JUNE 22, 1995

Before: MONROE G. MCKAY,* STEPHEN REINHARDT, AND FERDINAND F. FERNANDEZ, Circuit Judges.

OPINION

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* The Honorable Monroe G. McKay, Senior Circuit Judge for the Tenth Circuit, sitting by designation.

McKAY, Circuit Judge:

Petitioner, Mr. Yang, claims that the Board of Immigration Appeals abused its discretion in refusing to grant him a discretionary waiver under Section 241(a)(1)(H) of the Immigration and Nationality Act, 8 U.S.C.A. § 1251(a)(1)(H) (West Supp. 1994). Mr. Yang concedes that he is deportable, but argues that the BIA improperly considered impermissible factors in denying the waiver.

The BIA considered several adverse factors in declining to grant the waiver. First, the BIA seems to have considered Mr. Yang's participation in his wife's fraudulent entry into the country, including his taking part in sham divorces and remarriages. These activities were clearly inextricably intertwined with Mr. Yang's own efforts to secure entry into the country and must be considered part of the initial fraud. Thus, the BIA improperly considered these acts as adverse factors.

The BIA also considered as an adverse factor the fact that Mr. Yang has submitted a fraudulent application for citizenship. The BIA apparently viewed this as a separate fraud from the initial series of frauds that allowed Mr. Yang to gain access to the country and become a lawful resident in the first place. However, in the recent case of *Delmundo v. INS*, 43 F.3d 436, 440-41 (9th Cir.1994), we held that the fraudulent acts committed in applying for permanent resident status and obtaining a driver's license, social security card, and voter's identification card were an extension of the initial fraudulent entry and could not be considered by the BIA in denying a discretionary waiver of excludability. We think that applying for citizenship is similar in kind to the acts

at issue in *Delmundo* and also must be considered an extension of the initial fraud. Thus, the BIA improperly considered this fraudulent act.

Finally, the BIA considered as an adverse factor Mr. Yang's "apparent lack of candor" before the immigration judge. A review of the initial decision by the immigration judge discloses that there were two components to this "apparent lack of candor." First, the immigration judge did not find Mr. and Mrs. Yang's testimony to be credible with respect to how they came to be in the country in the first place. Mr. Yang claimed to be an innocent and ignorant pawn rather than an active and knowing participant in a continuing plan involving false birth certificates, phony names, and sham divorces and remarriages. The immigration judge did not take all of the frauds themselves into account, but did take into account Mr. Yang's implausible continuing assertions that he was not involved in any intentional wrongdoing.

The other aspect of Mr. Yang's "apparent lack of candor" was his claim of indigency. Mr. Yang initially claimed to the court that he needed the economic support of his children here in the United States because of his poor financial situation. Upon further questioning, he eventually admitted to having very substantial assets, including "over $3 million in property and real estate and liquid assets in cash, stocks, etc. of $700,000." Being untruthful with the immigration court is an adverse factor which may be properly considered by the BIA. *Delmundo*, 43 F.3d at 443.

Because the BIA considered impermissible factors, namely, Mr. Yang's collaboration with his wife and his fraudulent application for citizenship, the decision of the BIA is vacated, and this matter is remanded for a reweighing of the equities, considering solely as an

adverse factor Mr. Yang's allegedly dishonest testimony before the immigration court.

VACATED AND REMANDED.

APPENDIX B

Decision of the Board of Immigration Appeals
U.S. Department of Justice
Executive Office for Immigration Review
Falls Church, Virginia 22041

File: A36 413 841 - Los Angeles
IN RE: YUEH SHAIO *YANG*
IN DEPORTATION PROCEEDINGS

ORAL ARGUMENT: JUNE 10, 1993

CHARGE:

Order: Sec. 241(a)(1)(A), I&N Act [8 U.S.C. § 1251(a)(1)(A)]—Excludable at time of entry under section 212(a)(14), I&N Act [8 U.S.C. § 1182(a)(14)] — No valid labor certification

Sec. 241(a)(1)(A), I&N Act [8 U.S.C. § 1251(a)(1)(A)]—Excludable at time of entry under section 212(a)(20), I&N Act [8 U.S.C. § 1182(a)(20)]—No valid immigrant visa

Lodged: Sec. 241(a)(1)(A), I&N Act [8 U.S.C. § 1251(a)(1)(A)]—Excludable at time of entry under section 212(a)(19), I&N Act [8 U.S.C. § 1182(a)(19)]—Sought to procure entry by fraud or willful misrepresentation of a material fact

APPLICATION: Waiver under section 241(a)(1)(h)

In a decision dated October 26, 1992, the immigration judge found the respondent deportable on the charges set forth above and denied his application for a waiver of deportability pursuant to section 241(a)(1)(H) of the Immigration and Nationality Act, 8 U.S.C. § 1251(a)(1)(H).[1] Oral argument was held before the Board on June 10, 1993. The appeal will be dismissed.

The respondent is a 73-year-old native and citizen of Taiwan. During the course of the deportation proceedings, the respondent conceded deportability based on the allegations against him as set forth above (Tr. at 4, 23). The only remaining issue at the hearing and on appeal is the respondent's eligibility for a waiver of deportability under section 241(a)(1)(H) of the Act.

The respondent was the beneficiary of an immediate relative visa petition filed by his wife. He entered the United States as a lawful permanent resident on August 1, 1978. However, the respondent was not entitled to lawful permanent resident status through his wife because his wife's claim to United States citizenship was fraudulent.

The respondent's wife first traveled to the United States in 1977 as a visitor (Tr. at 28-29). While there, she met an individual named Vincent who allegedly advised her that she could obtain United States citizenship if she were single and invested $60,000 in the United States. The respondent's wife returned to

[1] The respondent and his wife were both placed in deportation proceedings. Their cases were consolidated for presentation before the immigration judge. For reasons of clarity, the Board will issue separate decisions in these matters. However, they have been reviewed simultaneously.

Taiwan and, after explaining the situation to the respondent, obtained a divorce on the basis of incompatibility (Tr. at 31). She then returned to the United States with the $60,000. Upon payment of the $60,000 to Vincent, she received a birth certificate for a United States citizen woman with a name and birthdate other than her own. She also obtained a United States passport in her assumed name (Tr. at 35-38, 53).[2] The respondent's wife returned to Taiwan, where she and the respondent were remarried (Tr. at 38). The marriage certificate reflects that the respondent's wife used the name that she had obtained for immigration purposes (Exh. 6). The respondent's wife proceeded to file immediate relative petitions for the respondent and some of their children (Tr. at 38). The petitions were filed by the respondent's wife as a United States citizen in her assumed name.

The respondent and his wife settled in California, where the respondent invested approximately $2 million in his business, which involved real estate, as well as the purchase of a residence (Tr. at 77-78). In 1982, the respondent filed an application for naturalization with the Service (Tr. at 87; Exh. 8). The respondent stated in that application that his wife was a United States citizen by birth, and he provided the name and date of birth for his wife as these appeared on the birth certificate that she had used for immigration purposes. In 1984, the respondent's wife read a newspaper article on the subject of immigration fraud, which prompted her to attempt to undo her claim of citizenship based on a birth certificate other than her own (Tr. at 40). She therefore had her

[2] The respondent's wife testified that the last name on the birth certificate is the same as her maiden name (Tr. at 37).

daughter, who had obtained United States citizenship, file a petition in her behalf under her true identity (Tr. at 56). In 1985, she and the respondent again divorced (Tr. at 40; Exh. 6). The divorce decree refers to the respondent's wife by the name she acquired in 1978. Then, in 1992, they were remarried. In the 1992 marriage, the respondent's wife used her real name.

Throughout these proceedings, both the respondent and his wife claimed that they had believed in the propriety of their method of entering the United States until the respondent's wife was alerted to the wrongdoing by a newspaper article (Tr. at 67, 100-101). Neither the respondent nor his wife found it unusual that the respondent's wife would adopt a different name, present another's birth certificate in order to obtain immigration benefits, or be required to obtain a sham divorce (Tr. at 75). During the course of the hearing, the respondent was questioned about alleged acts of immigration fraud by his children. The respondent testified that he was not aware of these incidents until after the fact (Tr. at 82).

The respondent suffers from hypertension and submitted a corroborative letter from his doctor (Tr. at 90). Although the respondent testified that the downturn in the economy has adversely affected his business, he retains substantial assets in this country (Tr. at 84-85). The respondent and his wife have six children. One of the respondent's daughters lives in Taiwan with her husband and children (Tr. at 45, 61, 69). She has assisted the respondent and his wife financially (Tr. at 79). Two of the respondent's children travel between China and the United States for business (Tr. at 66, 70). The remaining three children reside in the United States. The respondent resided in Taiwan from 1945, when he arrived there

from mainland China, until 1978, when he emigrated to the United States (Tr. at 93).

The immigration judge determined that the respondent was statutorily eligible for relief pursuant to section 241(a)(1)(H) of the Act. However, the immigration judge concluded that the respondent did not merit the waiver in the exercise of discretion. The immigration judge found that, although the terms of the waiver operated to excuse the respondent's fraud at the time of entry, the respondent's perpetuation of the fraud after entry constituted an adverse factor. The immigration judge did not find the respondent's testimony regarding his lack of knowledge of the fraudulent nature of the circumstances under which his wife obtained her citizenship to be credible. On appeal, the respondent contends that the immigration judge incorrectly attributed the fraudulent actions of the respondent's wife and children to the respondent. The respondent also argues that the immigration judge both failed to consider and mischaracterized the evidence. Finally, the respondent claims that he merits favorable exercise of discretion.

Section 241(a)(1)(H) of the Act affords the Attorney General discretion to waive the deportation of an alien who is the spouse, parent, son, or daughter of a United States citizen, and who was in possession of an immigrant visa procured by fraud or misrepresentation at the time of entry. The alien bears the burden to prove his eligibility for a waiver of deportability under section 241(a)(1)(H), and that he merits such relief as a matter of discretion. *Matter of Fereira*, 14 I&N Dec. 509 (BIA 1973).

As found by the immigration judge, the respondent is statutorily eligible for the section 241(a)(1)(H) waiver, which may operate to excuse the initial fraud

of entering the United States with an immigrant visa obtained under the auspices of his wife's fraudulent claim to citizenship. This initial fraud was admitted by the respondent and concededly disregarded by the immigration judge in his evaluation of the merits of the respondent's application for discretionary relief.

As with other discretionary applications for a waiver of deportability, section 241(f)(1) of the Act necessitates a balancing of the alien's undesirability as a permanent resident with the social and humane considerations present to determine whether according him such relief is in the best interest of this country. *Cf., e.g., Matter of Marin*, 16 I&N Dec. 581 (BIA 1978) (section 212(c) relief). Adverse factors in the instant matter include the respondent's acts of immigration fraud before and after his 1978 entry into the United States and his apparent lack of candor during the deportation hearing regarding his knowledge of the significance of his fraud.

We find that the respondent has engaged in a pattern of violating this country's immigration laws through fraud. The respondent initially participated in his wife's scheme to enter the United States under an assumed identity by going through a sham divorce and remarriage. He then entered the country himself as the purported beneficiary of a United States citizen. He next applied for naturalization in 1982 and perpetuated the fraud of his wife's identity as a United States citizen. Finally, he entered into another sham divorce in order to attempt to rectify his wife's initial fraud and allow her to resume her true identity. Although the respondent's fraud in entering the United States in 1978 can be waived, his remaining acts involving fraud cannot. *See Start v. INS*, 803 F.2d 539 (9th Cir. 1986).

In his favor, the respondent has resided in this country for 15 years and has invested a substantial amount of money here, which has resulted in significant property and business ties. In addition, three of his children live in the United States. We conclude, however, as did the immigration judge, that the respondent does not merit relief in the exercise of discretion.

First, the respondent claims that he no longer takes an active part in his businesses. Second, while three of his children reside here on a permanent basis, his eldest daughter lives in Taiwan, two of his children appear to spend a large part of their time outside of the United States, and his wife has returned to Taiwan. Third, although the respondent suffers from hypertension, there is no evidence to suggest that his condition could not be treated effectively in Taiwan. Finally, although the respondent has lived in the United States for 15 years, he previously resided in Taiwan as an adult for more than 30 years.

Because we find that the serious nature of respondent's continuing course of immigration violations, both before and after his entry in 1978, outweighs the factors in his favor, the appeal will be dismissed.

ORDER: The appeal is dismissed.

/s/ James P. Morris
JAMES P. MORRIS
FOR THE BOARD

APPENDIX C

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR
IMMIGRATION REVIEW
OFFICE OF THE IMMIGRATION JUDGE
Los Angeles, California

FILE NOS.: A 38 642 894
A 36 413 841

IN THE MATTER OF:

HAI-HSIA YANG, YUEH-SHAIO YANG,
RESPONDENTS

IN DEPORTATION PROCEEDINGS

[FILED: OCTOBER 26, 1992]

CHARGE: 241(a)(1)(A) as it relates to 212(a)(19) and 212(a)(20)—female respondent.
241(a)(1)(A) as it relates to 212(a)(14), (19), and (20)—male respondent.

APPLICATIONS: 241(a)(1)(H) of the Immigration and Nationality Act.

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondents are a wife and husband, citizens of the Republic of China (Taiwan), natives of mainland China. The female respondent is 67 years old, and the male respondent, 72 years of age. The respondents were issued Orders to Show Cause by Government officials on January 28, 1992, charging them with being deportable under Sections 241(a)(1)(A) as it relates to 212(a)(19) and (20) in regard to the female respondent, and 241(a)(1)(A) as it relates to 212(a)(14), (19), and (20) as it relates to the male respondent.

These respondents first appeared before this Court at a hearing on March 19, 1992. At that time, the respondents, through their counsel, admitted to the allegations and charge of deportability originally contained on [*sic*] their Orders to Show Cause.

Subsequently, at the hearing on October 26, 1992, the Government withdrew the 241(a)(1)(B) charge of entry without inspection in allegation 5 on the original Order to Show Cause of the female respondent and, at that time, also lodged an additional charge of 241(a)(1)(A) as it relates to 212(a)(19) of the Act in relationship to the male applicant. The respondent, through counsel, admitted the additional lodged charge filed against the male applicant at the hearing on October 26, 1992.

Deportability, therefore, is not in issue in this case as the respondents, through their counsel have conceded the allegations and charges of deportability filed against them and presently active in this case.

The respondents sought relief from deportation in the form of a Section 241(a)(1)(H) waiver. That appli-

cation places the burden upon the respondents to prove that they meet both the statutory and discretionary eligibility factors that warrant a favorable exercise of discretion. The respondents must show that they are persons who are a spouse, parent, son, or daughter of a United States citizen. In this specific case, the respondents make that qualification and claim based upon relationship as parents to a naturalized U.S. citizen, one of their daughters, Lily Liu, also known as Qui-Li Yang.

The respondents also must present evidence and verify that they are in possession of immigrant visas or equivalent documents and are not [sic] otherwise admissable to the United States at the time of such entry, except for the grounds of 212(a)(14), (19), and (20), now known as Sections 212(a)(5)(A), 212(a)(6)(A), and 212(a)(7)(A).

The respondents, from the evidence and record presented, clearly are eligible to apply for the relief they are seeking. It is now the Court's responsibility to review the record to see whether they warrant as a matter of discretion that relief. The Court, in making this determination, notes that it does not take into account the original fraud perpetrated against the United States Government by the respondents; that is, the original fraud of the female respondent filing papers claiming to a United States citizen and obtaining a U.S. passport. Nor does the Court consider or take into account the male respondent's coming to this country and making claims falsely to be a spouse of a United States citizen. *See Liwanag v. INS*, 872 F.2d 685, 687 (5th Cir. 1989). However, as the Court stated in that case, a Section 241(f) waiver (now Section 241(a)(1)(H)) can be appropriately denied if an

alien continues in his fraud or in other subsequent acts from the original fraud or misrepresentation.

The Court reviews the following facts and evidence presented in this regard in determining whether that application for a waiver should be granted. First, the Court notes the equities of the respondents in this case. Residen[ce] as permanent residents for approximately 14 or so years, albeit a questionable or fraudulent status; five of their six children who are lawful permanent residents of this country and grandchildren, noted but unnamed and unnumbered.

The elder age of the two individuals, the female respondent being 67 years of age and the male respondent 72 years of age, both suffering from some age diseases of hypertension and worry due to these proceedings, as well as the down turn in economic situation in this country that has caused problems for the male respondent's construction and land business.

The respondent and Government counsel, however, describe the background of the original fraud to help the Court understand the basis of subsequent actions by the respondents. Briefly to describe the original frauds: the female respondent testified that a friend introduced her to an individual who indicated that for a sum of $60,000, that she could obtain United States citizenship or a visa to come to this country and remain here permanently. She and her husband were coming on business visas for periods of time but having to return to Taiwan upon expiration of these temporary stays. They both indicated they like the United States, the lifestyle here as well as the opportunities provided—a desire to remain in the United States.

The female respondent testified that she believed that she was applying for "investor status." At that

time, a requirement of approximately $40,000 was required to be filed and submitted for such qualification. Non-preference investor visas have been "unavailable" for over a decade, into the late '70's or early '80's.

Nevertheless, the respondent asserted that she was duped or misl[e]d, she asserts, by this individual, asserting that she nevertheless believed that the application she signed and sought was as an investor coming here as an alien seeking to add to the economy of this country. Instead, the record indicates, it appears that the respondent made claims to being a United States citizen, a person by the name of Mary Wong. Respondent nevertheless obtained a United States passport and subsequently came to this country. During the process of obtaining this document, a claim to citizenship, she divorced her husband, i.e., the respondent in this case, in Taiwan on December 29, 1977, ending at least formally and legally a marriage which had begun in December of 1940, when their marriage took place in mainland China.

She did all of this with the agreement of her husband, who was informed that for $60,000, an individual would assist his wife in coming to this country. It was, as they both admit, an intention to divorce for immigration purposes with full intent to remarry one another upon the respondent's, i.e., female respondent, obtaining legal status to come to this country.

The female respondent then filed papers obtaining her U.S. passport and documents to emigrate her husband, the other respondent in this case, and four of her six children. These four children, as well as her husband, emigrated to this country as spouse and

children of a U.S. citizen; i.e., the false claim of being a citizen by the name of Mary Wong. A fifth child had earlier come to the United States through her husband and relationships and, subsequently naturalized to become a U.S. citizen. One other child, the eldest daughter, at one point apparently was involved in fraudulent filings of her own and prosecuted criminally for those actions. Their only son also apparently was involved in attempting to fraudulently bring this sister, Nancy (the eldest daughter), into the United States by making false claim of marrying and being her husband. *See* these details and some explanations given in Exhibit 6, a memorandum from the U.S. Government. This investigation, in fact, caused the opening of an investigation which ultimately resulted in the two respondents being filed with actions before this Court.

The respondents' story continues where it indicates that further documents filed with the Immigration Service occurred in 1984, when the female respondent indicates because of some newspaper articles or indications of Chinese frauds being discovered, that she became worried that the documents she had obtained were also fraudulent. Instead of consulting an attorney on those legal matters or reporting their suspicions and fears to Government officials, they instead, as a family, decided to have the naturalized U.S. citizen daughter file an immediate relative petition as the mother or parent of a U.S. citizen (*see* Exhibit 7). The respondent[s] filed these documents, and the female respondent again was able to obtain further immigrant visas; i.e., immediate relative status of a permanent resident, after filing those appropriate documents with consular officials. Subsequently, the respondents again divorced one another

on February 13, 1985, in California but later again remarried on April 4, 1992, in Nevada.

The male respondent testified, indicating that he was involved deeply in business matters in Taiwan and did not have the time to emigrate or to take care of immigration matters at the time his wife originally came to the United States; i.e., the original fraud entry. He was told by her that for $60,000, that she could emigrate through an investment, it was asserted, and that he could then later come through her to the United States.

This respondent subsequently did so, after selling his profitable an ongoing businesses in Taiwan, and, as noted earlier, came to the United States as the spouse of a citizen. The respondent, when questioned by the Court, indicated that to him, at the time, $60,000 was of little consequence to him, so he made no inquiry as to the manner in which the money would be used, nor did he ever interview or speak with the individual making arrangements for his wife to come here, ostensibly as an investor and actually, as the record indicates, as a claimed false U.S. citizen.

The respondent, however, did finally come to this country and carried on a construction and building business in the Southern California area. His present business is dormant because of the poor economic conditions in building and buying conditions of homes and other buildings. He did, however, testify that his land holdings include three undeveloped or partially developed properties in downtown Chinatown in Los Angeles, El Hambro, and Pasadena, as well as a residence in the San Marino area. The value he put at these four properties range to a total value of $3,350,000, not discounting, however, mortgages owed—that is the gross value.

The respondent also has two businesses in the United States (*see* Exhibit 6, sub-exhibit M and N). One business, he states, is, in effect, in paper only. The other business, Landmark Enterprises, is not, at this time, investing but has in its equity or balance sheet approximately $700,000 in liquid cash or other valuables.

The documents filed also by the Government disclose a filing by the male respondent of an N-400 application, or petition for naturalization (*see* Exhibit 8).

The last testimony and evidence provided by the respondent was from their naturalized U.S. citizen daughter, Lily Liu. She testified that she became a permanent resident through an in-law filing for her and her husband, coming to this country in the late 1970's. She ultimately became a naturalized U.S. citizen, one who, as noted earlier, filed a permanent resident immediate relative visa petition for the mother in 1984.

She testified that the family in the United States lived together in the same home in San Marino, although there is apparently three generations living together. This, however, is not an abnormal situation in Chinese families.

She testified that due to the business downturn of her father's businesses, that a sister in China, identified as "Mimi," also known officially as Cecelia, is the one who supports the respondents, according to their daughter and witnesses, from Taiwan.

The Government's argument is that the respondents, although eligible for the waiver, should be denied that application as a matter of discretion due to the continuing fraud and subsequent frauds perpetrated by the respondents and members of their

family since coming to the United States on the original fraud.

The Court notes the difficulties and desires of many individuals to come to the United States, for its opportunities, freedoms, and benefits; that many individuals will sometimes take the shortcuts to obtain residence in the United States.

The respondents in this case are clearly those who have sought such shortcuts in order to come to this country and now seek the Court to waive or relieve them of their prior actions.

The Court is sympathetic and understands the respondents desires when they came to this country but also notes that the respondents also, although committing original acts of fraud, have gone further subsequently to protect, perpetuate, and add to these fraudulent actions and filings, often with the acquiescence and actual knowledge of their children.

The Court notes in the female respondent's case that even in Court today, she equivocated in regard to her actions and the frauds perpetrated against the United States and the immigration laws of this country. She asserts that she was, in effect, an individual also duped by a con artist, who allegedly informed her that she was seeking an investor status but, to her surprise, actually had filed a fraudulent claim for her to make application to be a U.S. citizen. The Court notes, however, instead of coming clean and seeking Government assistance, she instead chose to continue with additional fraudulent actions by having a daughter file a visa petition on her behalf (*see* documents, Exhibit 7). The Court finds it difficult to believe that even though the female respondent is of limited formal education, that she did not realize the actions in

obtaining her documents and subsequently obtaining other immigration documents.

The Court, in making this finding, does not take into effect the original fraud or its actions but notes that the Court believes that the respondent has not been fully candid, if not continue[d] to lie to the Court in regard to her actions and prior applications to come to this country. The Court does not find credible her assertions that she was the duped individual in her original application to come to this country as a fraudulent U.S. citizen. It is difficult for the Court to believe that an individual would not have some suspicion that the documents filed for her were of questionable nature when requiring that she divorce her husband to come to this country, that a name change would have to be done for her to come to this country as an investor, that a United States passport would be issued to someone who is merely a[n] "investor" from another country. And, lastly, the Court notes the fact that in all intents, the respondent and her husband, i.e., the other respondent in this case, intended to remarry once she legalized her status here. That alone is indications of the divorce and actions for immigration purposes unlawful in and of itself. [*Sic.*]

The respondent, however, continued in this fraud by filing visa petitions on behalf of her husband and four children to come to this country, further making misrepresentations in those applications.

As noted subsequently, she asserts she worried about her original entry in 1984 and had her naturalized U.S. citizen daughter file additional papers for her to come as the immediate relative of a United States citizen. All these documents confirm to the Court's view that the respondents knowingly, fraudu-

lently entered into making applications for entry into this country that went *beyond* the original fraud. Exhibit 7, the application for immigrant visa and alien registration form, filed on the female respondent's behalf by a U.S. citizen child, indicates a number of obvious discrepancies that would have indicated to any intelligent individual, educated or not, that this document was of questionable and fraudulent nature. Item 2 indicates in Chinese and English that all listed names or other names used must be listed. The respondent never submitted or indicated that she had ever used the name "Mary Wong." Although truthfully, in Item 4, telling her true birth date of July 17, 1925, the respondent, as stated earlier, had no question in her original fraud about putting a different date of birth to her original application when she came here, further indicates of questionable conduct and actions.

Item 9 further indicates, in the Court's view, that the respondent filed these papers with fraudulent and knowing intent. The marital status indicating that including her present marriage, she had only been married on one occasion[]. The respondent, as the Court notes, was married not only in December of 1940 but had intentions to remarry again as soon as papers were sufficiently settled and completed. She did this approximately 3 months later in February of 1985. The respondent was, in effect, married to her husband on three separate occasions: in 1940, 1978, and 1992. Clearly at the time of filing of the application for immigrant visa in 1984, she had been married to her same husband on at least two occasions. This, however, was not disclosed. Lastly, in Item 31 of that visa, she disclosed two entries as B-2 visitors but failed to disclose her entries as a

claimed U.S. citizen on many other occasions after obtaining that original visa as an [sic] claimed U.S. citizen.

The respondent's daughter, the naturalized citizen, further assisted in perpetuating this fraud. Her I-130 visa petition accompanying on behalf of her mother also failed to disclose other names used by the female respondent or beneficiary. There was a claimed divorce from her father although, prior to that, a remarriage had occurred. *See* Item 3 of Form I-130. Item 5 also indicates that the beneficiary was allegedly never in the United States prior to making that application.

In the male respondent's case, he continued with his fraudulent application and actions by filing an N-400 application with the Immigration and Naturalization Service on or about August 17, 1982. These documents continue to perpetrate a continual fraud. Item 33 indicating that the respondent claimed to be married to a U.S. citizen by the name of "Mary," the marriage occurring on May 17, 1978, the second marriage to his wife, who had used the fraudulent identity. This claim was also added to by the fact that he agreed and protected the fraud and attempting to claim to seek that benefit; i.e., U.S. citizenship, by claiming his wife was born in San Francisco, California, February 15, 1931.

This respondent also was not, the Court believes, candid in all of his testimony and presentations to the Court, claiming indigency or a poor economic state and situation, needing the support of their family, i.e., children or daughters, to take care of them in this country because of the downturn and losses in his business. It was only after the Court was persistent in questioning the respondent that he conceded that

his assets were of substantia[l] and liquid nature, contrary to the testimony of the respondent's spouse as well as the male respondent's earlier testimony. Finally, disclosing assets in the form of over $3 million in property and real estate and liquid assets in cash, stocks, etc., of $700,000.

The Court further notes that the respondents, even when they [are] required to leave this country, are not returning to a country unfamiliar to them or unknown to them. It is a country where they have lived most of their lives, where they understand the culture and the language. The respondents also have two daughters apparently living in that country. Both of them apparently well-to-do in business, and one with in-laws of substantial economic power and wealth.

The Court lastly notes that the equities the respondents based their waiver on are also solely in relationship to children who obtained their benefits through the original fraud and, themselves, having committed actions of less than sterling nature. One child, their son, involved in fraud himself, attempting to bring his older sister to the United States by fraudulently marrying her and claiming a lawful and legal marriage. This daughter herself indicted and criminally convicted for immigration law violations. Their U.S. citizen naturalized daughter was involved in the fraudulent filing of the I-130 Exhibit 7 visa petitions for the female respondent.

None of these equities add to the respondents seeking of the relief but only convinces the Court that the respondents have continued, even to this day, to be equivocating and not fully truthful to the Court in seeking this relief, that they even, after the original frauds, continued to commit additional frauds

in seeking of additional benefits under the Immigration and Nationality Act.

The Court therefore finds as a matter of discretion that the respondents do not warrant the relief they are seeking, failing to show substantial equities that would convince the Court that they should remain in the United States as permanent residents. The respondents are not destitute, although old and in some medical difficulty. They nevertheless are wealthy individuals with family in their own country where they could return to and have a good and fruitful life. The family of the respondents, i.e, their children, are also in questionable status at this point, although other marriages and relationships in this country may be able to later cure their problems.

The Court therefore finds from the evidence presented that the respondents applications for relief should be denied.

ORDER

IT IS ORDERED that the respondents' applications for Section 241(a)(1)(H) relief be denied.

IT IS FURTHER ORDERED that the respondents be deported from the United States to the countries of birth and/or citizenship, the Republic of China, Taiwan.

/s/ Thomas Y. K. Fong
THOMAS Y. K. FONG
Immigration Judge

APPENDIX D

Not For Publication

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 93-70899
INS No. A36-413-841
[39-12C-3159]

YUEH-SHAIO YANG, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE, RESPONDENT

[FILED OCT. 5, 1995]

ORDER

Before: MCKAY,* REINHARDT, and FERNANDEZ, Circuit Judges.

The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc. The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

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* The Honorable Monroe G. McKay, Senior Circuit Judge for the Tenth Circuit, sitting by designation.

APPENDIX E

1. Section 241(f)(1) of the INA, 8 U.S.C. 1251(f)(1) (1988), as amended by the Act of Dec. 29, 1981, Pub. L. 97-116, § 8, 95 Stat. 1616, and repealed by the Act of Nov. 29, 1990, Pub. L. No. 101-649, Tit. 6, § 602(b)(1), 104 Stat. 5081, provided as follows:

§ 1251. Deportable Aliens

(f) Discretion of Attorney General to waive deportation for fraudulent entry in specified cases

(1)(A) The provisions of this section relating to the deportation of aliens within the United States on the ground that they were excludable at the time of entry as aliens who have sought to procure or have procured visas or other documentation, or entry into the United States, by fraud or misrepresentation, whether willful or innocent, may, in the discretion of the Attorney General, be waived for any alien (other than an alien described in subsection (a)(19) of this section [relating to persons involved in Nazi persecution]) who—

(i) is the spouse, parent, or child of a citizen of the United States or of an alien lawfully admitted to the United States for permanent residence; and

(ii) was in possession of an immigrant visa or equivalent document and was otherwise admissible to the United States at the time of such entry except for those grounds of inadmissibility specified under paragraphs (14), (20), and (21) of section 1182(a) of this title [relating to labor certifications, immigrant visas, and visa allocation provisions] which

were a direct result of that fraud or misrepresentation.

(B) A waiver of deportation for fraud or misrepresentation granted under subparagraph (A) shall also operate to waive deportation based on the grounds of inadmissibility at entry described under subparagraph (A)(ii) directly resulting from such fraud or misrepresentation.

2. Section 241(f) of the INA, 8 U.S.C. 1251(f) (1964), as added by the Act of Sept. 26, 1961, Pub. L. 87-301, § 16, 75 Stat. 655, provided as follows:

(f) The provisions of this section relating to the deportation of aliens within the United States on the ground that they were excludable at the time of entry as aliens who have sought to procure, or have procured visas or other documentation, or entry into the United States by fraud or misrepresentation shall not apply to an alien otherwise admissible at the time of entry who is the spouse, parent, or a child of a United States citizen or of an alien lawfully admitted for permanent residence.

3. Section 212(a) of the INA, 8 U.S.C. 1182(a) (1988), provided in pertinent part as follows before its amendment by the Act of Nov. 29, 1990, Pub. L. No. 101-649, Tit. 6, § 601(a), 104 Stat. 5075:

§ 1182. Excludable aliens

(a) General classes

Except as otherwise provided in this chapter, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:

* * * * *

(14) Aliens seeking to enter the United States, for the purpose of performing skilled or unskilled labor, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that (A) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of aliens who are members of the teaching profession or who have exceptional ability in the sciences or the arts), and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and (B) the employment of such aliens will not adversely affect the wages and working conditions of the workers in the United States similarly employed. The exclusion of aliens under this paragraph shall apply to preference immigrant aliens described in section 1153(a)(3) and (6) of this title, and to nonpreference immigrant aliens described in section 1153(a)(7) of this title;

* * * * *

(19) Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure, or has sought to procure or has procured, a visa, other documentation, or entry into the United States or other benefit provided under this chapter;

* * * * *

(20) Except as otherwise specifically provided in this chapter, any immigrant who at the time of application for admission is not in possession of a

valid unexpired immigrant visa, reentry permit, border crossing identification card, or other valid entry document required by this chapter, and a valid unexpired passport, or other suitable travel document, or document of identity and nationality, if such document is required under the regulations issued by the Attorney General pursuant to section 1181(a) of this title[.]

* * * * *

(i) Admission for permanent residence of alien spouse, parent, or child excludable for fraud, misrepresentation, or perjury

Any alien who is the spouse, parent, or child of a United States citizen or of an alien lawfully admitted for permanent residence and who is excludable because (1) he seeks, has sought to procure, or has procured, a visa or other documentation, or entry into the United States, or other benefit under this chapter by fraud or misrepresentation, or (2) he admits the commission of perjury in connection therewith, may be granted a visa and admitted to the United States for permanent residence, if otherwise admissable, if the Attorney General in his discretion has consented to the alien's applying or reapplying for a visa and for admission to the United States.